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Supreme Court of the United States

October Term, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ALLIANCE FOR COMMUNITY MEDIA, *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF TIME WARNER CABLE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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34 pp

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Consent of the Parties	1
Interest of *Amicus Curiae*	1
Summary of Argument	3
Argument	5
I. PETITIONERS' SECTION 10(a) ARGUMENTS FAIL BECAUSE THEY IGNORE THE CONSTITUTIONAL RIGHTS OF CABLE OPERATORS, WHICH ARE INTEGRAL TO—AND THE STARTING POINT FOR—THE ANALYSIS	5
II. SECTION 10(a) DOES NOT CONSTITUTE STATE ACTION AND THEREFORE DOES NOT RAISE ANY CONSTITUTIONAL ISSUES	7
A. The State Action Inquiry Cannot Be Ignored Merely Because Regulation Is Involved	8
B. No Provision In Section 10 Amounts To "Significant Encouragement" So As To Create State Action In Section 10(a)	14
C. Petitioners' Reliance On Federal Preemption Of State Law To Create State Action Is Misplaced	19

		Page
III.	EVEN IF SECTION 10(a) CONSTITUTES STATE ACTION, IT IS CONSTITUTIONAL WHEN THE FIRST AMENDMENT RIGHTS OF CABLE OPERATORS ARE BALANCED AGAINST THE ASSERTED RIGHTS OF LEASED ACCESS PROGRAMMERS, AS THEY MUST BE	20
IV.	SECTION 10(a) DOES NOT AUTHORIZE A PRIOR RESTRAINT	24
V.	LEASED ACCESS CHANNELS ARE NOT PUBLIC FORA	25
VI.	IF SECTION 10(b) RENDERS SECTION 10(a) UNCONSTITUTIONAL, SECTION 10(b) SHOULD BE SEVERED	28
Conclusion		30

TABLE OF AUTHORITIES

Cases	Page(s)
Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963)	22
Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)	19
Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987)	29, 30
Alexander v. United States, 113 S. Ct. 2766 (1993)	24
Blum v. Yaretsky, 457 U.S. 991 (1982)	10, 16
Buckley v. Valeo, 424 U.S. 1 (1976)	28, 29
Carlin Communications, Inc. v. Southern Bell Tel. & Tel. Co., 802 F.2d 1352 (11th Cir. 1986)	17
Carroll v. Blinken, 957 F.2d 991 (2d Cir.), *cert. denied*, 113 S. Ct. 300 (1992)	21
City of Los Angeles v. Preferred Communications, 476 U.S. 488 (1986)	5
Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973)	7
Communications Workers of Am. v. Beck, 487 U.S. 735 (1988)	19
Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985)	27
Crawford v. Board of Educ., 458 U.S. 527 (1982)	12, 13

	Page(s)
Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993), *appeal pending*	1
Dial Information Servs. Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992)	16
Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)	9, 10
FCC v. Midwest Video Corp., 440 U.S. 689 (1979)	5, 6
Flagg Bros. v. Brooks, 436 U.S. 149 (1978)	16
Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989)	18
Freedman v. Maryland, 380 U.S. 51 (1965)	24, 25
Goldstein, v. Time Warner Cable of New York City, 1995 WL 562182 (S.D.N.Y. 1995)	3
Hishon v. King & Spalding, 467 U.S. 69 (1984)	13
Hudgens v. NLRB, 424 U.S. 507 (1976)	26, 27
INS v. Chadha, 462 U.S. 919 (1983)	29
Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)	10, 14, 16
Katcoff v. Marsh, 775 F.2d 223 (2d Cir. 1985)	21
Lamont v. Postmaster Gen., 381 U.S. 301 (1965)	28

	Page(s)
Larkin v. Grendel's Den Inc., 459 U.S. 116 (1982)	11, 12
Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)	26, 27
Loretto v. Teleprompter Manhanttan CATV Corp., 458 U.S. 419 (1982)	11, 12
Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)	10
Marsh v. Alabama, 326 U.S. 501 (1946)	27
New York v. Ferber, 458 U.S. 747 (1982)	21
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	28
Norwood v. Harrison, 413 U.S. 455 (1973)	13
Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986)	15
Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)	27
Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956)	19, 20
Regan v. Time Inc., 468 U.S. 641 (1984)	28
Reitman v. Mulkey, 387 U.S. 369 (1967)	13
Rendell-Baker v. Kohn, 457 U.S. 830 (1982)	10
Riley v. National Fed'n of the Blind, Inc., 487 U.S. 781 (1988)	7
Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992)	28

	Page(s)
San Franciso Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987)	13
Schneider v. State, 308 U.S. 147 (1939)	8
Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989)	17, 18,19, 20
Smith v. California, 361 U.S. 147 (1959)	18
Southeastern Promotion, Ltd. v. Conrad, 420 U.S. 546 (1975)	24
Tilton v. Richardson, 403 U.S. 672 (1971)	30
Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994)	5
United States v. O'Neil, 11 F.3d 292 (1st Cir. 1993)	15
United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981)	26, 27

	Page(s)
Statutes	
Cable Communications Policy Act of 1984 § 612	*passim*
Cable Television Consumer Protection and Competition Act of 1992 § 10	*passim*
47 U.S.C. § 532	*passim*
47 U.S.C. § 541	26
47 U.S.C. § 551	3
47 U.S.C. § 608	29
Regulations and Related Materials	
In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 8 F.C.C. Rcd. 998 (1993)	15, 18, 25
Legislative History	
H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. (1992)	2
138 Cong. Rec. S646 (daily ed. Jan. 30, 1992)	2, 22, 29
Other Materials	
Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975)	22
10A Eugene McQuillan, *The Law of Municipal Corporations* (1990)	27

	Page(s)
Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (2d ed. 1992)	9
Cass R. Sunstein, *The Partial Constitution* (1993)	12
David H. Topol, *Union Shops, State Action, and the National Labor Relations Act*, 101 Yale L.J. 1135 (1992)	20
Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988)	10, 11
Harry H. Wellington, *The Constitution, the Labor Union, and "Government Action"*, 70 Yale L.J. 345 (1961)	20

Consent of the Parties

All petitioners and respondents in both *Denver Area Educational Telecommunications Consortium, Inc. and American Civil Liberties Union v. F.C.C., et al.*, No. 95-124, and *Alliance for Community Media, et al. v. F.C.C., et al.*, No. 95-227, have consented to the filing of this brief. Their letters of consent are being filed herewith.

Interest of *Amicus Curiae*

Amicus Time Warner Cable ("TWC") is the second largest cable system operator in the United States, with more than ten million customers nationwide. TWC submits this brief to provide the Court with the unique and integral perspective of a cable operator, itself a First Amendment speaker and the key player in the challenged statute.

This Court should uphold the constitutionality of § 10(a) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which restores to cable operators some of their First Amendment rights of editorial discretion that Congress had previously (unconstitutionally, we believe) taken away from them under the leased access provisions of the Cable Communications Policy Act of 1984 ("1984 Cable Act"), 47 U.S.C. § 532.

Section 612 of the 1984 Cable Act, among other things, compelled most cable operators to set aside 10-15% of their activated channels for commercial use by persons unaffiliated with the operator ("leased access" channels). 47 U.S.C. § 532(b). Most importantly, § 612(c)(2) prohibited operators from exercising virtually any editorial control over programming on leased access channels. *Id.* § 532(c)(2). These leased access requirements clearly are in derogation of the operator's First Amendment rights and TWC has challenged them as unconstitutional. *See Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1 (D.D.C. 1993), *appeal pending*.

Through § 10(a) of the 1992 Cable Act (amending 47 U.S.C. § 532(h)), however, Congress restored a portion of the editorial discretion that it had taken away from cable operators. Congress recognized that by stripping cable operators of

virtually all editorial discretion over leased access channels, it had created the problem of forcing cable operators to make sexually explicit programming widely available including to unsuspecting subscribers and minors. Congress therefore returned to cable operators sufficient editorial discretion to permit them to choose not to telecast indecent programming on such channels.[1]

With its editorial discretion restored to it by Section 10(a), in July 1995, shortly after the *en banc* decision below, Time Warner New York City Cable Group, one of TWC's largest divisions, announced a Leased Access Policy ("Policy") for its systems providing that "indecent" programming on leased access channels be carried on a designated channel and only during late-night and overnight hours, and be scrambled during those hours. The signal would be unscrambled within 30 days upon receipt of a subscriber's confidential written request.

TWC made an editorial decision to implement this Policy on its New York City systems to respond to the strong desires of a large segment of its subscribers. For many years, one of Time Warner's southern Manhattan cable system's channels—35—has been home to a substantial amount of sexually explicit programming.[2] Channel 35 has been available on the basic tier of service in unscrambled form on that system. Notwithstanding the availability of parental control mechanisms in the converter boxes used by subscribers which permits locking out of channels, over time large numbers of subscribers complained that they or their children had been exposed involuntarily to indecent programming on that

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[1] 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) ("This amendment simply gives the cable operator the right to reject [indecent programming]"). Introduced by Senator Helms and supported by Senator Thurmond, which petitioners intimate taints the section, the Amendment was approved unanimously by the Senate (*id.* at 649) and unopposed by the House in conference (H.R. Conf. Rep. No. 862, 102nd Cong., 2d. Sess. 80 (1992)).

[2] For instance, such programming has included graphic depictions of intercourse, masturbation, anal and oral sex, and advertising of phone sex lines and escort services.

channel. However, TWC, believing that other subscribers desired access to such programming, chose not to refuse to carry such programming altogether, as it could after § 10(a)'s effective date. Rather, the Policy fairly balanced the competing interests of the leased access programmers, the subscribers who did not want to receive the indecent programming on an unscrambled basis and those subscribers who desired to receive such programming.[3]

On September 20, 1995, the United States District Court for the Southern District of New York (Sand, J.) issued a preliminary injunction prohibiting the implementation of the Policy, holding that the plaintiff programmers were likely to succeed on the merits of their constitutional challenge to § 10(a) of the 1992 Cable Act, based substantially on the reasons set forth in Judge Wald's dissent. *Goldstein v. Time Warner Cable of New York City,* 1995 WL 562182 (S.D.N.Y. 1995). TWC agreed, in the interests of judicial economy, not to pursue its appeal pending resolution of this case.

In spite of Congress' return of cable operators' First Amendment right of editorial discretion, therefore, TWC's New York City cable system remains unable to exercise that right, and may continue to be unable to do so until this Court upholds the constitutionality of § 10(a).

Summary of Argument

Section 10(a), 47 U.S.C. § 532(h), merely returns to cable operators a certain degree of editorial discretion unconstitutionally taken from them in 1984 with respect to leased access channels (*see id.* § 532(c)(2)). Petitioners' various arguments as to § 10's alleged unconstitutionality all suffer from the fundamental error of ignoring Congress' original act of taking away cable operators' First Amendment

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[3] Channel 35 also carries substantial amounts of non-indecent programming. Under the Policy, to receive the indecent programming on Channel 35 a subscriber simply returns a card provided by TWC that states that the ordering person is the subscriber and is over 18 years old. The card is sealed, subject to confidentiality under 47 U.S.C. § 551, and indicates only that the subscriber wants to receive all Channel 35's programming.

rights. This Court simply cannot begin its inquiry midstream by looking only at the 1992 Amendments. Similarly, the Court must reject petitioners' invitation to analyze their claim without regard to the constitutionally based rights of cable operators which are integral to any analysis of § 10(a).

Section 10(a) authorizes private, not state, action and does not affect speech in a public forum, and therefore is not subject to First Amendment scrutiny. Contrary to petitioners' assertion, the state action analysis cannot be bypassed, nor state action presumed. The dissent below, determining that the blocking requirements of § 10(b) create state action, misinterpreted § 10 and misapplied this Court's cases regarding the level of encouragement of action by private entities permitted to Congress without creating state action. Here, notwithstanding the blocking requirements in § 10(b), § 10(a) permits voluntary action by the cable operator and involves no compulsion. As such, the procedural safeguards necessary for prior restraints are unnecessary with respect to § 10(a). Further, if § 10(b) does create state action, the Court is required to sever it from the rest of the statute to preserve the statute's constitutionality.

Even if state action is present, where the alleged "censor" is an electronic publisher, fully protected by the First Amendment, that publisher's constitutional freedoms must be considered in conjunction with any alleged infringements resulting from the exercise of its constitutional rights. Once the operators' First Amendment rights are put into the balance, there is no basis to hold that § 10(a) violates the First Amendment.

Finally, if the amendment embodied in § 10(a) is struck down, then the leased access statute clearly would no longer square with the congressional objective since it would remove more editorial discretion from cable operators than Congress intended. That ill-fit of means and end requires that what would be left of 47 U.S.C. § 532 be declared violative of the First Amendment.

Argument

I. PETITIONERS' SECTION 10(a) ARGUMENTS FAIL BECAUSE THEY IGNORE THE CONSTITUTIONAL RIGHTS OF CABLE OPERATORS, WHICH ARE INTEGRAL TO—AND THE STARTING POINT FOR—THE ANALYSIS.

Petitioners' arguments to this Court focus on the alleged unfairness and discrimination against programmers who may include indecent material in their programming that supposedly would result from § 10's implementation. While TWC agrees that this Court must consider the effects of § 10, as did the majority below, we submit that any analysis of § 10(a)'s constitutionality must start with the fact that cable operators are engaged in the constitutionally protected editorial activities of producing programming and selecting what programming they distribute to their subscribers.[4] The 1984 Cable Act, in derogation of those First Amendment rights, required that cable operators convert a portion of their capacity to leased access channels and removed the operators' editorial control over such channels.[5]

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[4] This Court, as early as 1979, recognized that cable operators, in making programming selections to create a lineup of services, are engaged in activity protected by the First Amendment. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) ("[c]able operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include"); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("[c]able television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers"); *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994) ("[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment").

[5] The Denver Area Educational Telecommunications Consortium and ACLU petitioners (collectively, "ACLU petitioners") in a bizarre twist argue that since leased access channels are creatures of federal creation, whatever editorial control over those channels the operator has is statutorily bestowed by the government. *See* ACLU Br. 21. This again ignores that editorial

Petitioners' arguments misleadingly focus on the more narrow issue of the effect of the 1992 Amendments to the Cable Act on leased access programmers, and ignore the larger issue that those programmers gained access to such channel capacity for the first time in 1984 by virtue of a statute that restricts the First Amendment rights of cable operators. Even if Congress could constitutionally mandate such access, the First Amendment rights of cable operators are integral to the analysis of § 10 and cannot be ignored, as petitioners would have this Court do. While indecent speech may enjoy constitutional protection, petitioners' right of access to private operators' cable systems for such speech is only statutorily based; it does not spring, as does the cable operator's right to exercise editorial discretion, from the Constitution.[6]

This Court recognized in the context of FCC-imposed access requirements that "even when not occasioning the displacement of alternative programming, compelling cable operators indiscriminately to accept access programming will interfere with their determinations regarding the total service offering to be extended to subscribers". *Midwest Video*, 440 U.S. at 707 n.17. Even more suspect is petitioners' request that this Court force cable operators to carry a specific type of programming, and to do so without considering the effect on the operators' First Amendment rights.

Similarly skewed is petitioners' contention that § 10 necessarily "disadvantages" those programmers desiring to offer indecent programming. *See* Alliance Br. 22. In fact, as to indecent programming, it merely returns such programmers

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control (and ownership) over each channel starts, under the Constitution, with the cable operator. The government then may be able to *restrict* that editorial control, but it *bestows* nothing on the operator. Indeed, the result that petitioners seek would turn the First Amendment on its head by leaving it to Congress to determine when and if publishers (*i.e.*, cable operators) can have any First Amendment rights whatsoever.

[6] The Alliance For Community Media ("Alliance") petitioners acknowledge that the right they are asserting in this case is a "statutory right" to be carried on an unrestricted basis. Alliance Br. 3.

to the same position as most non-leased access programmers with regard to cable operators' ability to exercise their constitutionally protected free speech rights. And yet, these leased access programmers still are in a favored position vis-a-vis other programmers since the operators' editorial control remains severely curtailed as to most other programming these same producers offer.

II. SECTION 10(a) DOES NOT CONSTITUTE STATE ACTION AND THEREFORE DOES NOT RAISE ANY CONSTITUTIONAL ISSUES.

In analyzing whether § 10(a) constitutes state action, this Court must consider that a cable operator such as TWC, a private actor, desires to exercise its First Amendment rights by banning or restricting certain indecent programming in order to editorially craft its program offerings. A cable operator's decision to telecast *or not* telecast certain speech is itself an act which is protected by the First Amendment.[7]

Even if it were assumed that the government wishes to restrict or ban indecent programming on leased access channels, a holding that § 10(a) constitutes state action truly would be novel. Nothing in the Court's prior decisions supports a finding of state action where a private speaker as an editorial matter affirmatively desires to engage in the conduct petitioners claim the government is advocating and which itself is constitutionally protected. Under such circumstances, any state "encouragement" must be weighed against the operators' First Amendment right to decide for themselves what they will or will not telecast. *See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 120 (1973) (plurality opinion joined by Rehnquist, J., recognizing that fundamental to the state action analysis is whether the actor itself is a First Amendment speaker).

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[7] *See Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781, 796-97 (1988) ("First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say").

A. The State Action Inquiry Cannot Be Ignored Merely Because Regulation Is Involved.

Petitioners contend that the state action issue poses no obstacle for this Court's review of § 10's constitutionality because the government is choosing which speech will be subject to the cable operators' exercise of their free speech rights. On one hand, the ACLU petitioners argue that the state action analysis simply can be skipped. ACLU Br. 19. The Alliance petitioners, on the other hand, propose that a finding of state action in this case is *automatic* by the mere "creation of the content-based law itself". Alliance Br. 22.[8] This is just wrong. Not even the dissent below suggested that the state action analysis could be either disposed of or its outcome assumed.

Petitioners claim that, as the courts must decide the constitutionality of every "legislative abridgment of [First Amendment] rights", the Court of Appeals in this case "disobeyed that mandate" by determining that it need not undergo a First Amendment analysis. ACLU Br. 19, quoting *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939). Even if petitioners are correct, there has been no such abridgement here.[9] The programmers' original right of access was based on a statutory grant by Congress—there was, and still is, no First

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[8] *Amicus* American Booksellers for Free Expression agree that the fact that a plaintiff is "challenging the statute and regulations themselves . . . does not end the inquiry" regarding whether the private party should be considered a state actor. Am. Booksellers Br. 9. Rather, the "private party's actions" under the statute challenged must be analyzed. *Id.*

[9] The petitioners grievously misapply this Court's language in *Schneider*. While it is true that the Court held in that case that where a First Amendment violation is alleged "the courts should be astute to examine *the effect* of the challenged legislation" (*id.* (emphasis added)), the Court did not hold, as petitioners argue, that such an allegation requires a court to "decide its *constitutionality*" in every case. *See* ACLU Br. 19 (emphasis added). Rather, an examination of the effect of the challenged legislation necessarily must include the question of whether the Constitution is *implicated* by that legislation. Whether there is state action is integral to that analysis in the First Amendment context.

Amendment entitlement to such access. Congress' removal of that mandated access does not curtail First Amendment rights—it recognizes them (albeit in a limited fashion) by returning editorial discretion to the cable operator. The analysis therefore must focus on whether the actor who is allegedly "silencing" certain speech is acting for the state when it decides, if it does, to deny access to indecent programming.[10]

Petitioners' argument that the state action question arises only in cases involving an "individual citizen" that "feels that his [or her] freedoms or rights have been violated by the actions of another"[11] also misses the mark. Whom the plaintiff chooses to sue, whether the individual actor or the government through a facial challenge to the statute, simply does not determine whether the constitutional analysis is undertaken. For instance, petitioners cite *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). ACLU Br. 19 n.24. In that case, this Court, in deciding whether the alleged racially discriminatory use of preemptory challenges in civil cases amounted to state action, first analyzed whether the act in question was created by the government. This Court found that the alleged discrimination *would not have been possible* without the government's creation of preemptory challenges. *Id.* at 620-21 ("there is no constitutional obligation to allow [preemptory challenges]"). Here, the cable operators' underlying right not to carry programming if it so desires derives directly from the Constitution, not from § 10(a)—they need legislative

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[10] The argument that this Court should focus on only the potentially harmful effects of decisions made pursuant to § 10 and ignore who the decision-makers are (ACLU Br. at 16-17) is simply a different formulation of the argument that this Court dispense with the state action analysis altogether. While petitioners cite cases that allegedly support their position that the effect of the statute marks the proper starting point for constitutional analysis (*see id.* at 16 and n.21), in all those cases (and unlike here) the state action was clear—legislation either prohibited or compelled specific behavior, resulting in the infringement of free speech.

[11] ACLU Br. 19, n.24; Alliance Br. 22, quoting Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 16.1, at 524 (2d ed. 1992).

authorization only to countermand the legislative blocking of the exercise of that constitutional right in the first place.

Petitioners and amici attempt to distinguish several cases cited by the majority below finding no state action on the ground that the challenges in those cases were not direct challenges to any statutes or administrative regulations. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Blum v. Yaretsky*, 457 U.S. 991 (1982). In each of those cases, however, because there was no authorizing statute, the state action inquiry necessarily revolved around the private actor's conduct, and no statute could have been facially challenged. *See, e.g., Rendell-Baker*, 457 U.S. at 841 ("the decisions to discharge the petitioners were not compelled or even influenced by any state regulation"). Nothing in this Court's precedents suggest that the state action inquiry would not need to be conducted in those cases if a legislative enactment authorizing the private action at issue was instead challenged directly. Indeed, the Court's emphasis on the importance of the analysis of the actions of the private individuals suggests that such an inquiry is always central, regardless of whether such action is challenged directly or as the logical consequence of an authorizing statute. [12]

Petitioners and amici cite a snippet from Laurence Tribe's constitutional law treatise which allegedly supports their argument that a direct challenge to a statute obviates the need for a "formal inquiry" into the state action issue. *See* Alliance Br. 21; Am. Booksellers Br. 6-7. The full sentence from Tribe's treatise, however, makes clear that state action is "obvious" only where the challenged statute is facially discriminatory, "such as a law mandating racial segregation of

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[12] Similar to *Leesville Concrete*, the state action inquiry in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), did not turn on whether the plaintiff facially challenged the statute authorizing prejudgment attachment, or sued the individual attaching the subject property. In fact, the main inquiry in that case involved whether Section 1983's requirement of "under color of" state law differed from the state action requirement. *Id.* at 926-35.

public schools". Laurence H. Tribe, *American Constitutional Law* § 18-1, at 1688 (2d. ed. 1988). This is not such a case. After all, as discussed above, § 10(a) merely authorizes cable operators to engage in their own constitutionally protected activity that Congress had previously denied them. As Tribe goes on to discuss, one of the primary purposes of the state action doctrine is to carve out an arena where the Constitution may not infringe on individual freedoms:

> "[B]y exempting private action from the reach of the Constitution's prohibitions, [the state action requirement] stops the Constitution short of preempting individual liberty—of denying to individuals the freedom to make certain choices, such as choices of the persons with whom they will associate. Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution's demands." *Id.* § 18-2, at 1691.

The importance of keeping an individual freedom exempt from constitutional scrutiny is heightened where, as here, that freedom itself *specifically* is constitutionally protected. The finding of state action, therefore, cannot simply be presumed as petitioners suggest.[13]

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[13] The ACLU petitioners' reliance on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Larkin v. Grendel's Den Inc.*, 459 U.S. 116 (1982), as cases in which statutes were "subjected . . . to scrutiny even where no harm would have occurred unless a third party did something that it was authorized (but not compelled) to do" (ACLU Br. at 17), is similarly without merit. As the Court below recognized, state action existed in those cases because the government gave the private parties powers that traditionally had been exclusively that of the government. App. 12a-13a (citations to "App.__a" herein refer to the appendix to the Petition for a Writ of Certiorari in No. 95-124). In *Loretto*, this Court analyzed whether a New York law requiring a landlord to permit a cable company to install its facilities on rental property constituted a "taking" under the Fifth Amendment and, recognizing the landlord's constitutionally protected property rights, this Court determined that the statute was a taking. 458 U.S. at 423, 441. The ACLU petitioners attempt to analogize the conduct of the cable operator in *Loretto* to that of the cable operator pursuant to § 10, as the cable operator in *Loretto* was not

Petitioners' citation to Sunstein's *The Partial Constitution* (1993) similarly does not support their contention that the state action analysis is not necessary here. To the contrary, Sunstein consistently points out the necessity of the state action inquiry, emphasizing that "the First Amendment is aimed only at governmental action, and that private conduct raises no constitutional question". *Id.* at 204. Moreover, according to Sunstein, the expression of ideas by private actors in the marketplace does not raise any constitutional concerns. Rather, it is the "'regulation' of 'the market' that is problematic". *Id.* Under this formulation, Congress' original "regulation" of leased access in the 1984 Cable Act is constitutionally suspect. Its "deregulation" of speech, albeit only in part, through § 10(a) therefore necessarily lessens (but far from eliminates) the constitutional problems inherent in the initial regulation and cannot itself be unconstitutional.[14]

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compelled, but only authorized, to seek access to the landlord's property. This analogy fails because the cable operator in *Loretto* was asserting a statutory, not a constitutional right of access. If anything, the cable operator vested with the authority pursuant to § 10 is more like the landlord in *Loretto*—an entity with recognized constitutional rights which must be protected. In that case, this Court determined that the rights could be protected by just compensation; here, the Court should determine that the rights must be protected by upholding the statute.

Larkin clearly does not support ACLU petitioners' argument that the state action analysis can be disregarded. There, this Court found objectionable that the state had delegated to a private party the decision-making authority that properly belongs in the hands of the state—the power to issue liquor licenses. *See* 459 U.S. at 127. Because that power was placed in the hands of religious organizations, this Court concluded that the statute violated the Establishment Clause. *Id.*

[14] Another way of looking at the instant case is that Congress granted programmers on leased access channels greater rights to access than that to which they are entitled under the Constitution. That Congress now chooses to repeal its grant of that excess protection cannot be considered unconstitutional merely because the repeal is partial. As this Court recognized in *Crawford v. Board of Educ.*, 458 U.S. 527 (1982), in its consideration of a state constitutional amendment limiting the power of the state courts to enforce the state-created right to desegregated schools:

> "In short, having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States. It could have conformed its law to the Federal Constitution in every respect. That it chose to pull back only in part . . . most assuredly does not render the Proposition unconstitutional on its face." *Id.* at 542.

That said, petitioners' claim that *any* partial restoration to cable operators of their editorial discretion, *e.g.*, vis-a-vis "the speech of African-Americans or socialists or speech opposing reduction of welfare grants" (ACLU Br. 22; *see also* Alliance Br. 23) would be facially violative of the First Amendment is unsupported and insupportable. Indeed, any restoration of cable operators' editorial discretion must be analyzed, as discussed herein, within the context of the operators' First Amendment rights (as opposed to programmers' statutorily granted access rights), and therefore is presumptively constitutional.

Petitioners' attempt to analogize the instant case to one in which Congress carves out an exception to Title VII to allow private employers to discriminate against persons of a particular race is similarly misguided. *See* Alliance Br. 23. Petitioners' contention that such a "statute would arguably 'restore' to employers the pre-existing right to base employment decisions on discriminatory grounds" (*id.*) conveniently overlooks the essential distinction that employers have no constitutional right to so discriminate. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rejecting claim that application of Title VII would infringe constitutional rights of freedom of association because "'invidious private discrimination . . . has never been accorded affirmative constitutional protections'", (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973))).[15] Here, on the other hand, cable operators do have a constitutionally protected right to refrain from engaging in certain types of speech, including indecent speech. *See supra* n.7.

Finally, petitioners contend that § 10(a) is not a restoration of cable operators' First Amendment rights of editorial

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[15] Petitioners' reliance on *Reitman v. Mulkey*, 387 U.S. 369 (1967) and *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (*see* ACLU Br. 20), fails for the same reason. In both cases there was no federal *constitutional* right to engage in the private conduct authorized under the statute.

discretion because when the 1984 Cable Act was passed, many cable operators had already entered into local franchise agreements prohibiting cable operators from exercising such editorial discretion. *See* Alliance Br. 5, 23; ACLU Br. 3. While that argument is flawed even as to public access channels, it cannot be made as to *commercial leased access* channels, which did not exist prior to the 1984 Cable Act.[16] Any channels over which a cable operator relinquished its editorial control through the franchise process were *public* access channels. The 10-15% of a cable system's channel capacity that today must be dedicated to commercial leased access use were under the complete editorial control of cable operators prior to 1984.

B. No Provision In Section 10 Amounts To "Significant Encouragement" So As To Create State Action In Section 10(a).

A finding of state action is justified when the private entity performs a public function, or when the actions of the private entity evidence a sufficiently close nexus between the government and that entity to attribute the actions of the entity to the government itself. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-52 (1974). Where, as here, neither justification is present, no finding of state action is warranted.

Petitioners, as well as Judge Wald in dissent below, argue for a finding of state action based on the flawed notion that, through § 10, the government coerces cable operators into taking "adverse action" against indecent programming. *See* App. 46a-49a; Alliance Br. 28-30; ACLU Br. 24. Section 10 simply does not *command* or otherwise coerce that result, but leaves the cable operator to choose from at least

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[16] Petitioners' statement that "access channels" have been dedicated for 25 years (Alliance Br. 4; ACLU Br. 2), is but one example of petitioners' and amici's blending of "public" and "leased" channels into "access" channels when convenient to their argument. While TWC primarily comments herein on the constitutionality of leased access requirements, we urge this Court to analyze public and leased access channels separately to the extent that their characteristics do in fact differ.

three options—it may prohibit indecent programming under § 10(a), it may choose to institute on its system the FCC regulations regarding indecent programming as issued under § 10(b), or it may provide such indecent programming on non-access channels, where it has the discretion to telecast such programming as it sees fit (the "middle ground" petitioners claim does not exist, *see* Alliance Br. 29).[17] The very existence of these choices obliterates petitioners' argument that *Congress* has chosen how to treat indecent programming, and makes clear the error of Judge Wald's proposition that "the §§ 10(a) and (b) option is no different in its effect" from a formulation requiring a cable operator either to ban indecent programming or to block it pursuant to the government's directives (App. 48a).

While petitioners claim operators are hostile to indecent

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[17] Indeed, TWC in its Policy, which was not pursuant to § 10(b), exercised a fourth option. The Policy did not implement the total ban permitted by § 10(a), but rather put certain restrictions on indecent programming (by scrambling and late-night scheduling). *See In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 F.C.C. Rcd. 998 (1993) ("First Report and Order", App. 128a) ¶ 31, App. 144a ("[s]ection 10(a) would also appear to permit cable operators to adopt any measures appropriate for implementation including, but not limited to, the requirements we adopt under section 10(b)"). After all, the greater power to ban indecent programming under § 10(a) includes the lesser power to impose restrictions on such programming. *See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345-46 (1986); *United States v. O'Neil*, 11 F.3d 292, 296-97 (1st Cir. 1993) (recognizing that "[t]he principle that the grant of a greater power includes the grant of a lesser power is a bit of common sense that has been recognized in virtually every legal code from time immemorial" and applying principle in criminal law context, citing *Posadas*). Although the second sentence of § 532(h) does use the word "prohibiting" in describing a policy on indecent programming, when read in conjunction with the "subject to conditions" language of the first sentence, the statute is at least ambiguous as to whether cable operators are free under § 10(a) voluntarily to enact policies which do less than prohibit indecent programming. As the FCC recognized, the overall section and congressional intent appear to have the objective of permitting a cable operator voluntarily to condition the offering of indecent programming if it does not ban such programming.

programming on leased access and will disadvantage such programming "while retaining this profitable income source on their own channels" (Alliance Br. 43), they really are complaining that other programmers have created more attractive programming that cable operators are anxious to program without coercion.

Similarly, even if the presence of § 10(b) provides some incentive for cable operators to establish their own policy to prohibit indecent programming, that is not enough to find state action by "significant encouragement". Such an argument was rejected in *Blum v. Yaretsky*, where the Court held that decisions to transfer patients on Medicaid from state-subsidized nursing homes to lower level facilities were private actions of the medical staff rather than state action, notwithstanding that government regulations made such transfer possible and, in fact, encouraged the nursing homes to transfer patients to less expensive facilities when appropriate. 457 U.S. 991, 1007-08, 1008 n.18 (1982).[18] So too with § 10. Nothing in §§ 10(a) or (b) dictates the outcome, and § 10(b) does not "dominate" the operators' decision-making process. *See* App. 22a-23a.[19]

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[18] *See also Flagg Bros. v. Brooks*, 436 U.S. 149, 164-66 (1978) (holding that enactment of statute enabling private sale of goods by warehouseman was not "authorization" or "encouragement" sufficient to constitute state action); *Jackson*, 419 U.S. at 357 ("[r]espondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action'"); *id.* at 350 (state regulations even if "extensive and detailed" did not make utility's action state action).

[19] Similarly, in *Dial Information Servs. Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992), the Second Circuit upheld a statute requiring telephone companies that provide billing services for dial-a-porn providers not to transmit dial-a-porn unless the customer specifically requested access (or "presubscribed"). That court found no state action, emphasizing that the statute "does not require the telephone company to implement the presubscription method of billing, unless the company voluntarily has chosen to provide billing services for providers". *Id.* at 1543. Nor did the Court find that the statute compelled the telephone company to refuse to provide billing services to dial-a-porn providers.

The criteria to be applied is not governmentally dictated, but rather left to the operators' considerations of the desires of its subscribers and its views of optimum programming mix. The fact that Congress defined the area of programming for which it was returning editorial control does not create state action since without some delineation of the sphere in which the cable operator could exercise its discretion, the return of editorial control could not effectively be accomplished. That is not the kind of "involvement" that can create state action.[20]

Petitioners also attempt to compare the facts in the instant case with those in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), in order to support their overly aggressive assertion that anything "more than just a 'passive position' toward the challenged" private action constitutes state action. Alliance Br. 27-28; *see also id.* at 32 (*Skinner* has "strikingly similar facts"); ACLU Br. 24. This comparison falls quite short. *Skinner* involved the issue of whether the Fourth Amendment is applicable to actions of private parties, as a search and seizure can be unconstitutional only if conducted by the state or a private party acting as "an instrument or agent of the Government". 489 U.S. at 614. This Court in *Skinner* found "clear indices of the Government's encouragement, endorsement, and participation" in the testing of railway workers for drugs and alcohol. *Id.* at 615-16. These "specific features" included the Federal Railroad

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[20] Thus, the argument of *amicus* American Booksellers that state action exists here because the "standard" for decision-making is "established by the state" is incorrect. *See* Am. Booksellers Br. 9-10 n.16. The state is merely defining the realm over which private actors, cable operators, have the ability to make private decisions. The finding in *Blum* that there was no state action because the decisions to transfer or discharge patients turn on "judgments made by private parties" (457 U.S. at 1008), therefore, is directly analogous to the instant case. *See Carlin Communications, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1357-61 (11th Cir. 1986) (regulator's study and explicit approval of public utility's policy of banning indecent messages did not make that policy state action, where decision as to which messages were indecent was made by utility).

Administration's actual participation in the testing of railroad employees with the right to receive test samples and results. *Id.* at 615. Here, not only is there absolutely no similarity on the facts of the two cases, but § 10(a)'s return to cable operators of the ability to exercise editorial control over indecent programming does not even approach the high degree of government participation involved in *Skinner*.[21]

Petitioners also argue that, by removing cable operators' immunity from liability for telecasting obscene programming on leased access channels, § 10(d) forces operators to ban indecent speech out of an excess of caution. *See* Alliance Br. 29-30; ACLU Br. 5. While TWC contends that § 10(d) places unconstitutional burdens on cable operators where they are forced to deal with program providers on leased access, petitioners nonetheless overstate the effect of § 10(d) vis-a-vis state action. Here, the FCC has determined that operators may pre-screen programs to limit their liability under § 10(a). First Report and Order ¶ 43 n.39, App. 151a. The FCC also notes that: (i) consistent with *Smith v. California*, 361 U.S. 147 (1959), operators who do not prescreen, and thus lack actual knowledge of the contents of a program, should be immune from prosecution for violation of obscenity laws (First Report and Order ¶ 43 n.39, App. 151a-152a); and (ii) cable operators may also avoid liability under § 10(b) by relying on the certification of the programmers (*id.* ¶ 43, App. 151a-152a).[22]

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[21] Petitioner's claim that state action exists because the FCC will adjudicate disputes over whether certain programming is indecent (Alliance Br. 31-32) simply is not applicable to § 10(a), as such a dispute resolution mechanism is provided only for disputes arising under § 10(b). First Report and Order ¶ 75, App. 167a-168a.

[22] Petitioners ignore this Court's holding in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989). In that case, the Court noted that any obscenity statute will "have some inhibitory effect on the dissemination of material not obscene". *Id.* at 60. However, it squarely held that "[t]he mere assertion of some possible self-censorship resulting from a statute is not enough to render [it] unconstitutional". *Id.* Petitioners also contradict themselves by arguing both that cable operators choose to carry indecent programming on non-access channels (*see* Alliance Br. 43), and that cable

At bottom, nothing in § 10 significantly encourages the cable operator to ban indecent programming. Moreover, the fact that Senator Helms and others in Congress may have counted on cable operators' inclination to restrict or ban indecent programming on leased access if given back their editorial control is not a basis for finding state action. After all, the converging of a private actor's objective with that of Congress, if not achieved by congressional coercion or direct government participation (which has not happened here), does not trigger state action, especially where the private actor is exercising rights protected by the First Amendment.

C. Petitioners' Reliance On Federal Preemption Of State Law To Create State Action Is Misplaced.

Petitioners rely almost exclusively on *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956), for the proposition that state action inheres where a federal statute preempts state law. Alliance Br. 24-27; ACLU Br. 23-24. *Hanson* was a labor case that simply does not support a theory that preemption *per se* equals state action.[23]

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operators uniformly will "take the safe route and simply ban all materials" that cannot be certified as "decent" (*see* Alliance Br. 30).

[23] In *Hanson*, non-union employees brought an action against a railroad company and labor organizations to enjoin the application and enforcement of a union shop agreement. The ACLU petitioners' contention that this Court "subsequently and repeatedly [has] reaffirmed *Hanson's* rationale" is simply wrong. *See* ACLU Br. 23 n.30, citing *Communications Workers of Am. v. Beck*, 487 U.S. 735, 761 (1988), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 218 n.12 (1977). Neither *Beck* nor *Abood* commented on the validity of *Hanson's* rationale with regard to the state action issue, but instead made passing reference to the Court's state action analysis in *Hanson* in *dicta*. *See Beck*, 487 U.S. at 761 (noting petitioner's reliance on *Hanson* and concluding that "[w]e need not decide whether the exercise of rights permitted, though not compelled, by [the statute at issue] involves state action"); *Abood*, 431 U.S. at 218 n.12 (the Court merely described the state action analysis in *dicta*, but neither commented on its validity nor deemed it necessary for its holding).

Neither is the *Skinner* decision supportive of petitioners' "preemption creates state action" theory. A close reading of *Skinner* evidences that the Court's determination of state action in that case was made, as it must be,

First, the theory that federal preemption of state law *alone* can create state action is itself unsound. After all,

> "[i]t is surely not the case that any time the federal government preempts state law, state action exists. As Professor Wellington explained . . . , if the preemption theory were adopted, '[it would mean] that all private action taken under the authority of federal legislation that occupies a field by that token alone becomes governmental action.'"[24]

Second, in *Hanson*, the "source of the power" to invade "private rights" was the federal statute. 351 U.S. at 232. Here, the true source of a cable operator's power to restrict indecent programming is its private, constitutionally recognized right of editorial discretion, not § 10(a). *Third*, neither *Hanson* nor *Skinner* has been applied outside the labor context to find state action, and there is no reason to do so in this case.

III. EVEN IF SECTION 10(a) CONSTITUTES STATE ACTION, IT IS CONSTITUTIONAL WHEN THE FIRST AMENDMENT RIGHTS OF CABLE OPERATORS ARE BALANCED AGAINST THE ASSERTED RIGHTS OF LEASED ACCESS PROGRAMMERS, AS THEY MUST BE.

Even if § 10(a) is found to constitute state action (or a

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in view of all the circumstances. *Skinner*, 489 U.S. at 614. The "circumstances" in that case were numerous, including regulations that superseded collective bargaining agreements and prohibited the railroad from divesting itself by contract of the authority to test employees. *Id.* at 615. In addition, the regulations *mandated* compliance by employees. *Id.* Clearly, then, federal preemption of state law in *Skinner* was merely *one* factor considered by the Court in its analysis of whether there was sufficient "Government[] encouragement, endorsement, and participation" to implicate constitutional safeguards. *Id.* at 615-16. There is no authority for a finding of state action here where federal preemption is the *only* factor.

[24] David H. Topol, *Union Shops, State Action, and the National Labor Relations Act*, 101 Yale L.J. 1135, 1149 (1992) (*quoting* Harry H. Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 70 Yale L.J. 345, 356-57 (1961)).

First Amendment analysis of that provision is otherwise required), and further assuming that mandatory leased access itself is not unconstitutional as a violation of cable operators' First Amendment rights, that would not justify the application of the "strict scrutiny" test. A different test should be applied where, as here, the "state actor" is a First Amendment speaker, such as a cable operator, which itself independently desires (and but for government interference once had the right) to take the action at issue. This would be consistent with the recognition, adopted in the Establishment Clause area, that "a test which may be reasonable in one context may be wholly inappropriate in another". *Katcoff v. Marsh*, 755 F.2d 223, 233 (2d Cir. 1985). Under such circumstances, the Court must balance the cable operator's First Amendment rights, the government's interests and whatever rights leased access programmers have once granted access onto cable systems. A finding of state action neither strips the cable operator of its First Amendment rights, nor removes those rights from the analysis of its actions upon leased access programming.[25]

This approach of balancing competing interests is no less valid here than when weighing pure governmental action against a First Amendment speaker's rights, an approach which lies at the very heart of First Amendment jurisprudence. *See, e.g., New York v. Ferber*, 458 U.S. 747, 764 (1982) (balancing competing interests of government restricting child pornography with First Amendment speaker's right of expression); *Carroll v. Blinken*, 957 F.2d 991, 999-1002 (2d Cir.) (court needed to balance the First Amendment rights of students not to underwrite speech of others with university's First Amendment interests in fostering a "marketplace of ideas" on its campus), *cert. denied*, 113 S. Ct. 300 (1992).[26]

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[25] To the extent that the Government is considered to have conceded (either in this Court or below) that § 10(a) is unconstitutional if there is state action, TWC strongly disagrees for the reasons set forth herein.

[26] This corresponds with the notion adopted in the First Amendment context that the Free Exercise Clause and the Establishment Clause, while potentially at odds, must be reconciled in practice. *See Katcoff*, 755 F.2d

Where there is an independent First Amendment basis for the operator's action, the challenged statute should be upheld even if not the least restrictive manner of accomplishing its objective. This certainly should be so where, as here, the statute allows the operator the flexibility to avoid unduly burdening the programmers' speech. *See* n.17, *supra*.

Section 10(a) permits TWC to exercise its First Amendment right (restrained by Congress in 1984) to package its programming in the best way it sees fit and to respond to its subscribers' concerns by limiting the exposure of certain subscribers—unsuspecting adults and minors—to indecent programming, while being responsive to subscribers who want access to such programming. Petitioners offer no evidence refuting that indecent programming on access channels is troublesome to large numbers of viewers.[27] Section 10(a) also furthers the government's interest in addressing the problem of indecent programming available in an unrestricted manner on leased access channels. Weighed against these interests are programmers' *statutory* rights to access granted by Congress, *not* the Constitution, in derogation of TWC's First Amendment rights.

Even if petitioners are found to be asserting First Amendment rights, it simply cannot be true that program providers and viewers desiring to have access to plaintiffs' programming via cable have greater rights than the cable

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at 234 n.4 ("'[t]hese two proscriptions are to be read together, and in light of the single end which they are designed to serve'" (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring))). "Just as it is a function of the judiciary to strike the balance between the competing claims of the free exercise clause and the establishment clause of the first amendment, so it is the court's responsibility to strike the balance between competing first amendment issues in the media-access cases". Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20, 48 (1975) (footnote omitted).

[27] For example, during the Senate floor debate on § 10, a letter was read into the record from a cable subscriber complaining that she and her daughter stumbled upon a "couple engaging in oral sex" on an access channel in New York. 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992).

operators (and those of their subscribers) who want to reject indecent programming. *See* App. 13a (recognizing this case as "'a battle for supremacy between the asserted rights of private persons'"). Section 10(a) allows cable operators to adopt an approach such as TWC's Policy, which is clearly a reasonable means of balancing the competing interests of its First Amendment rights with the interests of programmers and both groups of subscribers. Indeed, by placing the decision on indecent programming back in the cable operators' hands, the government has removed itself from the process—in practical effect the least intrusive approach.

Permitting cable operators to refuse to telecast indecent programming altogether, or to telecast it only under restrictions the cable operator finds acceptable, does not restrict First Amendment rights; it recognizes them.[28] The balancing of interests here must be resolved in favor of § 10(a)'s constitutionality. And the cable operators' approach, if somehow unreasonable, might be redressed, as to leased access channels for example, by an action under § 612(d)—not by striking down a statute that itself lessens restrictions on the cable operators' First Amendment rights.

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[28] Cable operators have always had the unfettered ability to make decisions regarding programming carried on non-public, non-leased access channels. Section 10 gives back that same ability to operators with regard to indecent programming on leased access channels. Further, the record only indicates that to the extent there is arguably indecent programming on non-access channels, the signals on those channels are scrambled unless separately ordered (like Playboy and Showtime), thereby already providing some measure of protection against exposure of minors and unsuspecting subscribers to such programming. Adult pay-per-view channels also are scrambled and must be separately ordered—with parents having the option of a private code to gain access to such films. Section 10, therefore, does not disadvantage indecent leased access programming; it merely takes away the unfair advantage granted such programming by Congress under the 1984 Cable Act to the detriment of operators' First Amendment rights.

IV. SECTION 10(a) DOES NOT AUTHORIZE A PRIOR RESTRAINT.

Petitioners' argument that § 10(a) fails because it creates a censorship scheme amounting to a prior restraint without procedural safeguards also suffers from fatal defects.

First, as discussed above, § 10(a) merely authorizes *private* action. Cable operators who take action pursuant to § 10(a) are not state actors and, as a result, are not subject to procedural due process requirements. *Second*, and related, the action permitted by § 10(a) does not amount to a "prior restraint". "The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur'." *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993) (citation omitted). Obviously, a decision by a cable operator to ban indecent programming amounts to neither an "administrative" nor "judicial order[]", and therefore would not qualify as a "prior restraint". *Third*, in all the cases relied upon by petitioners, the government was undertaking censorial powers.[29] In this case, a cable operator who chooses to ban or restrict indecent programming on its leased access channels is not engaging in an act of censorship, but is instead exercising its own First Amendment right of editorial discretion. Petitioners can point to no case where the alleged restraint itself was the exercise of free speech rights.

It is for this reason that, even if § 10(a) is found to constitute state action, this Court still should not find that it

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[29] *Compare Freedman v. Maryland*, 380 U.S. 51, 52 n.1 and n.2 (1965) (State Board of Censors granted statutory authority to "disapprove" films which were obscene or which "tend, in the judgment of the Board, to debase or corrupt morals or incite others to crimes" and making it unlawful to"sell, lease, lend, exhibit or use" any film not approved and licensed by the Board); *Southeastern Promotion, Ltd. v. Conrad*, 420 U.S. 546, 548 n.2, 554 (1975) (board confirmed by the city's board of commissioners and whose chairman was, by ordinance, the city's commissioner of public utilities, grounds and buildings, was empowered by municipal ordinance to grant or deny use of municipal theater based on its review of the content of the proposed production).

allows an impermissible prior restraint. When the government acts as a censor, the First Amendment rights of only one party, the party that seeks to present the censored speech, are at issue. The dispute is over whether the speech at issue is protected by the First Amendment. In that case, adequate protection of the speaker's rights is ensured by requiring procedural safeguards such as prompt judicial review where the government has the burden of showing that the censored speech is unprotected. *See Freedman*, 380 U.S. at 57-59.

Under § 10(a), however, the decision whether or not to present indecent speech is made by someone who is also a protected speaker. Therefore, the requirements set out in *Freedman* should be read less stringently. Under 47 U.S.C. § 532(d), a programmer has the right to bring suit in district court if it disagrees with an operator's decision not to provide it with leased access channel capacity. If the court finds that the programmer was improperly denied access, it may order the cable operator to provide it. *Id.*; *see also* First Report and Order ¶ 31 and n.28, App. 144a-145a. Thus, Congress has put in place a procedural framework balancing the interests of operator and programmer and protecting the programmer's statutory right to access.

In any event, § 10(a) cannot be a prior restraint on its face, at least where programmers receive advance notice of a cable operator's refusal to telecast indecent material, thereby permitting an order to show cause to be brought challenging that decision. In that case, the spirit of *Freedman* is satisfied.

The situation therefore simply is not analogous to one in which the government acts as a censor, and the Court should not require procedures which ignore the First Amendment right of the cable operator to use editorial discretion.

V. LEASED ACCESS CHANNELS ARE NOT PUBLIC FORA.

There is simply no justification for a finding that leased access channels constitute public fora. Indeed, petitioners argue only that public access channels constitute public fora and do not even attempt to apply this argument to leased access

channels.[30] Further, Judge Wald in dissent below did not rely on the public forum doctrine. *See* App. 53a-54a.

A cable system's channels plainly constitute the operator's private property. These systems were built at an enormous capital expense and with the expectation that cable operators would have the discretion to select the programming to provide subscribers on those channels. The 1984 Cable Act removed that discretion (unconstitutionally, we believe). That does not turn those channels into public fora.

Moreover, Congress has specified that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service". 47 U.S.C. § 541(c). There is no support, therefore, for the argument that cable operators are mere conduits of programming on leased access channels and that those channels are government property.[31]

As the majority below correctly noted, under the public forum doctrine "[s]tate action is present because the property is the *government's* and the *government* is doing the restricting". App. 28a (emphasis added). The argument that public forum principles can apply to private property dedicated to public use has been rejected by this Court. In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Court, in holding that a shopping center may prohibit the distribution of handbills, emphasized that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes" and that "[t]he Constitution by no means requires such an attenuated doctrine of dedication of private property to public use". *Id.* at 569. Similarly, in *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court held that striking workers had no right to picket in a shopping center, as that shopping center's private property was not converted into a

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[30] The arguments set forth herein that leased access channels are not public fora apply with equal force to public access channels.

[31] In *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), the Court rejected the notion that "simply because an instrumentality 'is used for the communication of ideas or information,' it thereby becomes a public forum". *Id.* at 130 n.6.

public forum merely by the public's use of it. *Id.* at 519-21, citing *Lloyd*, 407 U.S. at 567-70.[32]

Indeed, the government may assert complete control over private property without converting that property into a public forum. In *Greenburgh*, 453 U.S. at 123, 128, this Court found that a home mailbox, supplied and paid for by the homeowner, but controlled and regulated by the government, did not constitute a public forum. The passing reference in *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985), to "private property dedicated to public use" is merely dictum, and in view of this Court's other holdings does not support the use of such a doctrine. Nor is *Marsh v. Alabama*, 326 U.S. 501 (1946), applicable here. In that case, the "company town", although privately owned, had assumed "all of the attributes of a state-created municipality". *Lloyd*, 407 U.S. at 569, citing *Marsh*, 326 U.S. 501.[33]

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[32] The Court's decision in *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), is inapplicable here. The issue in that case was the interpretation of a state constitutional provision which specifically authorized more expansive free speech protection than the Federal Constitution. There the Court merely held that the state may require more expansive protection without violating the free speech rights of the owner of the property. Justice Powell, concurring, wrote that "I do not interpret our decision today as a blanket approval for state efforts to transform privately owned commercial property into public forums". *Id.* at 101.

[33] Petitioners claim that public access (not leased access) channels have been designated as public fora by the government in exchange for the use of easements on public rights of way. They also claim that sidewalks and streets are private property to support their argument that private property can and should be considered public fora. *See* Alliance Br. 34-35; New York City petitioners Br. 18-21. *First*, all media gain some form of public benefit (magazines receive reduced postage rates, newspapers use vending machines on government land) yet retain their private property status. The presence of newspaper vending machines on city streets does not turn newspapers into public fora. Moreover, no other private communications media has ever been turned into a public forum by government designation as a price for use of public property. *Second*, while the abutting landowner may be (but is not always) deemed by the municipality to own the fee in the public street, that fee is not voluntarily assumed, but imposed merely because of the geographical proximity of the

VI. IF SECTION 10(b) RENDERS SECTION 10(a) UNCONSTITUTIONAL, SECTION 10(b) SHOULD BE SEVERED.

If this Court concludes that the interplay between §§ 10(a) and 10(b) supplies the state action element rendering § 10(a) subject to strict scrutiny and a finding of unconstitutionality then § 10(b) can—and must—be severed to preserve the remainder.[34]

Courts have an obligation to interpret statutes so as to maintain their constitutionality. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)). As a result, when faced with a constitutionally suspect provision of a statute:

> "[A] court should refrain from invalidating more of the statute than is necessary. . . . '[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid'". *Regan v. Time Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion; citation omitted).

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landowner. *See* 10A Eugene McQuillan, *Law of Municipal Corporations* § 30.32 at 281 (1990). In any event, the street is public before the landowner obtains the fee in it.

[34] While we do not discuss the constitutionality of § 10(b) herein, we vehemently disagree with petitioners' reliance on *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965). *See* Alliance Br. 48 n.36; ACLU Br. 43-45. That case simply is not analogous to the matter at hand. *First*, every subscriber has to let the cable operator know what services they are ordering, whether it is Playboy, an adult pay-per-view movie, or the Disney Channel and a record is made of that selection (which must be kept confidential). A written request to receive all leased access programming is no different, and certainly informing a cable operator in 1995 that one wishes to receive such programming cannot validly be compared to an "official act" of informing the Federal Government in 1965 that one wishes to receive Communist propaganda that the government says "contains the seeds of treason". 381 U.S. at 307. *See also* App. 39a, n.23. Further, because any inhibitory effect is "highly speculative", *Buckley v. Valeo*, 424 U.S. 1, 69-70 (1976), there is no First Amendment violation.

The invalid portions of a statute are to be severed "'[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not'". *Buckley v. Valeo*, 424 U.S. 1, 108 (1976); *accord INS v. Chadha*, 462 U.S. 919, 931-32 (1983). Where, as here (47 U.S.C. § 608), a statute includes a severability provision, the presence of such a clause "gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend on whether [the suspect provision of the Act] was invalid". *Chadha*, 462 U.S. at 932; *see Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987).

Even without this presumption in favor of severability, both the structure of the statute and its legislative history support a ruling of severability. *First*, Congress enacted § 10(a) as an amendment to § 612(h) and added § 10(b) as a new § 612(j). This indicates Congress' intent that the two provisions work separately. *Second*, § 10(a) does not rely on anything in § 10(b) for its operation. "A provision is further presumed severable if what remains after severance 'is fully operative as a law'". *Chadha*, 462 U.S. at 934. *Third*, Senator Helms clearly envisioned a legislative scheme which would make it possible for cable operators voluntarily to enact policies regarding indecent programming. Thus, Congress' intent was to "give[] cable operators the legal right to make [the] decision" about indecent programming on leased access channels. 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992). Taken together, these factors demonstrate that severability is not only a proper solution, but *the* proper solution.[35]

In this case, if this Court determines that the presence of § 10(b) renders § 10(a) unconstitutional, and § 10(b) is severed from the remainder of the statute, § 10(a) would be clearly constitutional. *See* App. 78a, 88a. Thus, because "[t]he court . . . has an obligation to save rather than destroy as much of the statute as is constitutional", App. 85a (Rogers, J.,

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[35] The same analysis (and conclusion) is warranted if this Court decides that the presence of § 10(d) renders § 10(a) unconstitutional.

concurring in part and dissenting in part (citing *Tilton v. Richardson*, 403 U.S. 672, 684 (1971))), this Court must sever § 10(b), to the extent it is found to be unconstitutional, and allow § 10(a), a constitutionally permissible provision, to stand.

If, however, this Court finds that § 10(b) is integral to § 10 and that § 10(a) cannot stand alone, then the entire leased access provision should fall. Should the Court strike down § 10 as unconstitutional, it must inquire "whether the statute [here, 47 U.S.C. § 532] will function in a manner consistent with the intent of Congress". *Alaska Airlines*, 480 U.S. at 685. It no longer advances the government's interest in programmer diversity to require unrestricted access to indecent programming when Congress itself has clearly indicated it does not intend for such programming to fall within the purview of government mandated access.

Clearly, if § 10(a) is removed from the leased access section, the remaining provisions would not be tailored to effect what Congress believed to be legitimate government interests. Indeed, if the statute were used to compel carriage of indecent programming, as plaintiffs contend, it would flatly contravene congressional intent. 47 U.S.C. § 532, therefore, must be struck down if the § 10 amendments are removed.

Conclusion

For the foregoing reasons, the decision of the Court of Appeals with respect to § 10(a) of the 1992 Cable Act should be affirmed.

January 29, 1996.

Respectfully submitted,

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